



**NEVADA COMMISSION ON ETHICS
EXECUTIVE DIRECTOR'S REPORT AND RECOMMENDATION
REGARDING JUST AND SUFFICIENT CAUSE**

REQUESTS FOR OPINION No. 04-60
THROUGH 04-65, CONSOLIDATED

SUBJECT: HARRY SHULL
PLANNING COMMISSIONER
CITY OF NORTH LAS VEGAS

A. JURISDICTION:

Mr. Shull is not a public officer as defined by NRS 281.4365; therefore the Commission does not have jurisdiction regarding allegations relating to NRS 281.481(2) or NRS 281.501(2). However, as a member of the Planning Commission of the City of North Las Vegas he is subject to the requirements of NRS 281.501(3). Thus, the Commission has jurisdiction over the allegations relating to NRS 281.501(3).

Pursuant to the provisions of *Nevada Administrative Code* 281.101, the Commission has consolidated the six requests for opinion as the requests share common facts and issues.

B. REPORT OF INVESTIGATIVE ACTIVITIES:

- Reviewed Requests for Opinion 04-60 through 04-65 (Tab B)
- Reviewed subject's response dated December 10, 2004 (Tab C)

C. RECOMMENDATIONS:

The Executive Director hereby recommends the Panel find that just and sufficient cause **DOES NOT EXIST** for the Commission to hear and render an opinion in this matter relating to the provisions of:

- NRS 281.501(3).

SPECIFIC REASON:

No allegation or credible evidence of any fact that amounts to or supports a violation by any public officer of the above provision of NRS Chapter 281.

D. SUMMARY OF REQUEST FOR OPINION:

The request for opinion alleges violations of NRS 281.481(2), NRS 281.501(2) and NRS 281.501(3), by Harry Shull, a member of the City of North Las Vegas Planning Commission. Specifically, the complaint alleges that Commissioner Shull:

- Met with members of the City of North Las Vegas Planning Commission and City Council to advocate for a proposed zone change related to a parcel of land recently purchased by Celebrate Homes, a company in which he has a pecuniary interest, in violation of NRS 281.501(2) and NRS 281.501(3); and
- Used his public office to gain special consideration with the Planning Commission and City Council in an attempt to gain an unwarranted privilege for Celebrate Homes in violation of NRS 281.481(2).

E. SUMMARY OF SUBJECT'S RESPONSE:

In his response, Commissioner Shull denies any violation of any of the provisions of the Ethics in Government Law as asserted in the complaint and provides the following information:

- He sought the input of the members of the City Council and Planning Commission regarding the proposed project, but did not advocate for the project in any formal setting;
- Faced with opposition to the project by area homeowners, he terminated any active role in promoting the project and in seeking the requisite zone change;
- He abstained from all votes and did not contact any members of either the City Council or Planning Commission regarding this project after initial opposition; and
- Celebrate Homes ultimately abandoned its requested zone change, deciding instead to build a Ranch Estate subdivision in conformance with the existing zoning.

F. PERTINENT STATUTES AND REGULATIONS:

NRS 281.501 Additional standards: Voting by public officers; disclosures required of public officers and employees; effect of abstention from voting on quorum; Legislators authorized to file written disclosure.

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3. In a county whose population is 400,000 or more, a member of a county or city planning commission shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:

- (a) His acceptance of a gift or loan;
- (b) His direct pecuniary interest; or
- (c) His commitment to a member of his household or a person who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity.

It must be presumed that the independence of judgment of a reasonable person would not be materially affected by his direct pecuniary interest or his commitment described in paragraph (c) where the resulting benefit or detriment accruing to him or to the other persons whose interests to which the member is committed is not greater than that accruing to any other member of the general business, profession, occupation or group. The presumption set forth in this subsection does not affect the applicability of the requirements set forth in subsection 4 relating to the disclosure of the direct pecuniary interest or commitment.

G. RESULTS OF INVESTIGATION:

Allegations regarding NRS 281.481(2) and NRS 281.501(2):

As previously discussed under the Commission Jurisdiction analysis in Section A of this report, Mr. Shull is not a public officer as defined by NRS 281.4365; therefore the Commission does not have jurisdiction regarding allegations relating to NRS 281.481(2) or NRS 281.501(2).

Allegations regarding NRS 281.501(3):

The evidence offered within the complaint indicates Commissioner Shull spoke to members of the City of North Las Vegas Planning Commission and City Council on behalf of his business about a potential project that would require a zone change. At the time these meetings took place, the project was still only in contemplation and no formal action had yet been taken that would have officially brought the matter in front of either the Planning Commission or the City Council for a vote. Merely speaking to members of governmental bodies about a possible future project seems insufficient to amount to a violation under this statute. According to Commissioner Shull, he spoke with these individuals in order to determine their attitude toward the project that his company was contemplating. In this regard, he was like any other person attempting to determine the attitude of the Planning Commission and City Council toward a future project.

In *NCOE Opinion No. 97-07* (the Kubichek opinion), the Commission addressed a similar issue while interpreting the provisions of NRS 281.501(2), which are virtually identical to those of NRS 281.501(3). In Kubichek, the Commission opined:

“The real question, therefore, is a novel one in the jurisprudence of this Commission: Where is the line between prohibited advocacy and allowed participation in the consideration of a matter under NRS 281.501(2)?

As a starting point, NRS 281.501(2) explicitly prohibits only two acts by a member of the legislative branch, namely voting and advocacy. The legislative intent, therefore, is that anything that is not a vote or advocacy is allowed a member of the legislative branch. Furthermore, under this construct, a “vote” is readily and objectively ascertainable, since it is a formal and binding acknowledgement of assent in or dissent from a formally made motion to take a particular action. Ms. Kubichek did not vote in contravention of NRS 281.501(2).

Our analysis, therefore, must seek to discern between those acts that would constitute impermissible advocacy and those acts that would be permissible participation. We think the line is most evident through illustration. For example, if Ms. Kubichek were an applicant for a permit before her own County Commission, she would be required by NRS 281.501(2) and (3) to disclose her interest and abstain from voting on or advocating for the passage of her permit **as a County Commissioner**, but she could step out into the audience and testify regarding her permit **as the applicant**. We see nothing in NRS 281.501(2) and (3) or elsewhere in the Ethics in Government Law that would compel the conclusion that once Ms. Kubichek became a County Commissioner, she became barred for the remainder of her term from participating in the ordinary processes of Humboldt County government as any other citizen would. Such a conclusion would be absurd and would severely restrict the pool of potential candidates for any office.

In so saying, though, we must caution that Ms. Kubichek could not use her position as a County Commissioner to affect the outcome of her application, because to do so would violate NRS 281.481(2) and cause her other commissioners to violate NRS 281.481 (1). Thus, Ms. Kubichek could not threaten her fellow commissioners with her opposition to their measures unless they passed hers. Likewise, Ms. Kubichek could not promise that she would act positively toward measures proposed by her fellow commissioners if they supported her personal measures. In other words, if Ms. Kubichek had a personal matter before her County Commission, she would need to be treated by them and she would need to treat them as any other citizen would.

The issues raised in this Opinion present another scenario where the fine line between advocacy and participation can be seen. For example, let us assume a matter involving garbage collection came before the County Commission, so Ms. Kubichek had to disclose her interest in Desert Disposal and abstain from voting or advocating regarding the matter. NRS 281.501(2) would allow Ms. Kubichek to “otherwise participate” in the matter, and in order to render this term meaningful, we find that the Legislature meant that Ms. Kubichek could do **something**. That “something” might be, for example, that Ms. Kubichek could provide facts **as any other citizen**. This is particularly crucial to this Opinion because Ms. Kubichek was, presumably, elected in part because of her unique knowledge of garbage and landfill issues that were pertinent to her constituents. Again, we cannot find in NRS 281.501(2) and (3) or any other portion of the Ethics in Government Law that a public official loses her voice after her election regarding issues about which she might possess unique and valuable knowledge and experience.

We must caution, though, that the line dividing allowable factual testimony and prohibited advocacy is razor thin. Statements that begin, “in my opinion...,” “I think...,” “I believe...,” or “I would hope...,” would be signals that the statement might be more advocate than informative. A statement like, “The standard dumpster you see in the back of restaurants holds X cubic yards of garbage,” would clearly be an allowable statement of fact. The intent of the statement is guiding. A statement of advocacy is prohibited, even if factual, because the intent of advocacy is to get the hearer to believe the same as the speaker, and where the speaker has special influence and power because of her position, the hearer might be influenced to act not because of the merits of the speaker’s argument but because of the speaker’s position itself. On the other hand, a statement of fact, without

any overtones of advocacy, is allowed because the intent of the speaker is merely to inform the hearer and so theoretically the person of the speaker should be irrelevant because information is information and facts are facts, regardless of who provides them.

As we have said before, the line between a statement of fact and a statement of advocacy will often be razor thin. Because the consequences of crossing the line will always rest upon the elected official proffering the statement, the best general rule we can give is that an elected official who has already disclosed and abstained from a matter because of a disabling conflict of interest should always consider whether what she has to say really needs to be said, and if she thinks so, then she must be very careful with what she says and how she says it. Prudential forethought, common sense, and concern for appearances of impropriety will be the best prophylaxis. We interpret NRS 281.501(2) not to be a strict prohibition, but a stiff caution. In other words, a member of the legislative branch may speak about a matter in which she is interested, but she had better know why, what, and how **before** she does so.

Thus, we interpret NRS 281.501(2) to allow an otherwise legally conflicted elected official to “otherwise participate” in a matter by participating as a citizen applicant before the elected official's body and by participating as a provider of factual information. We appreciate the difficult position Mr. McCormick found himself in when he advised Ms. Kubichek regarding NRS 281.501(2) and NRS 281.481(2) because this Commission had no previous analogous opinions. Mr. McCormick gave the most conservative advice, and Ms. Kubichek abided it, even though she disagreed with it. We applaud both Mr. McCormick and Ms. Kubichek for the civil and appropriate way in which they handled their impasse. Would that more public officials would act so professionally and in the public's best interest.”

Commissioner Shull provides that he abstained from any further participation in this matter when confronted with opposition from neighborhood homeowners. Further, he made no other attempts to speak with members of the Planning Commission or the City Council, nor did he participate or vote in the matter as a member of the Planning Commission. Eventually, the project was abandoned for one designed to be in compliance with existing zoning limitations. His attempt to find out whether both the Planning Commission and the City Council would be amenable to the abandoned project appears to be consistent with the guidance provided by the Commission in the Kubichek opinion. There is no evidence which contradicts Commissioner Shull's assertions or which would support a violation of Commissioner Shull vis-à-vis his duties as a member of the Planning Commission.

Further, the provisions of NRS 281.501(3) might not have actually been implicated. The complaint addresses a contemplated project, one which Commissioner Shull was interested in pursuing. No formal action had been taken nor request made before the Planning Commission. Under these circumstances, it is unclear whether there existed a “matter” that actually implicates NRS 281.501(3).

NRS 281.501(3) reads, in pertinent part:

“A public officer or member of a county or city planning commission “shall not *vote* upon or advocate the passage or failure of but may otherwise participate in the consideration of, a *matter*...” (Emphasis added).

A literal reading of this statute would suggest that the “matter” in question must be something that requires a vote, or at the minimum, something that is formally under consideration. A public officer cannot vote upon something that does not require a vote. Nor can a public officer advocate the passage or failure of something that is not under consideration.

In the instant case, neither the Planning Commission nor the City Council was considering Commissioner Shull’s contemplated project in any formal way. There is no evidence which indicates the project was pending in front of the Planning Commission, thus Commissioner Shull did not have an opportunity to vote upon or advocate the passage or failure of the project. Indeed, the facts indicate that the idea for the project was abandoned for another project in which no zone change would be required.

Accordingly, the Executive Director finds no credible evidence to substantiate the allegations within the complaint, and supports a finding that no just and sufficient cause exists to present the matter to the full Commission.

H. CONCLUSION:

The Executive Director hereby recommends that the panel find just and sufficient cause does not exist for the Commission to hold a hearing and render an opinion on the allegation that the subject violated NRS 281.501(3), and further that the complaint in its entirety be dismissed.

DATED: March 28, 2005

Stacy M. Jennings
STACY M. JENNINGS, MPA
EXECUTIVE DIRECTOR